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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 702

SEABOARD & WESTERN AIRLINES, INC.,
Petitioner,

vs.

CIVIL AERONAUTICS BOARD, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND SUPPORTING BRIEF.

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Intervenor,

PAN AMERICAN AIRWAYS, INC.,
Intervenor

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

To the Honorable Fred M. Vinson, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Seaboard & Western Airlines, Inc., respectively shows to this Court:

Statement of the Matter Involved

A. *Background*

Petitioner is an air carrier engaging in international air transportation of property on an irregular or non-scheduled

basis. It is operating under the authority of a Letter of Registration issued by respondent, Civil Aeronautics Board, pursuant to its economic regulations. There is pending before respondent a proceeding in which petitioner is applicant for a certificate of public convenience and necessity authorizing it to conduct international air transportation of property without limitation of frequency or regularity.

Transcontinental & Western Air, Inc., American Overseas Airlines, Inc., and Pan American Airways, Inc. are air carriers engaging in international air transportation of persons, property and mail under certificates of public convenience and necessity. These carriers, as mail certificated carriers, are entitled to and are receiving mail pay pursuant to Section 406 of the Civil Aeronautics Act of 1938, as amended (52 Stat. 998, 49 U. S. C. 486). Petitioner receives no mail pay or subsidy of any kind, and depends entirely upon its commercial revenues for survival.

Petitioner and the above named carriers transport property between points in the United States and points in Europe, and elsewhere. Petitioner transports property over many of the same routes as the above named carriers, and is, therefore, in direct competition with them.

B. *Mail Rate Proceedings Before Respondent*

Section 406 of the Civil Aeronautics Act (52 Stat. 998, 49 U.S.C. 486) empowers and directs respondent to fix and determine, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by air carriers holding certificates authorizing them to transport mail. Among the elements to be considered by respondent in fixing a rate is the need of the air carrier for mail pay sufficient to enable it, under honest, economical, and efficient management, "to maintain and continue the

development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense."

In 1946 respondent instituted proceedings to fix mail rates for Transcontinental & Western Air, American Overseas Airlines, and Pan American Airways. At the same time so-called "temporary" rates for these carriers were set, such temporary rates to be paid them pending the adoption of permanent rates. In 1947 and again in 1948 retroactive increases in these temporary rates were awarded by respondent. Upon the initial fixing of or subsequent increase in a temporary rate for a past period, a lump sum is immediately paid to the carrier. Such payments are in fact payments on account, there having been no determination of the actual amount to which the carrier will later be found entitled. The amount paid under temporary rate orders may be greater or less than the amount later authorized in a permanent rate order.

On December 7, 1948, respondent on its own initiative proposed a third increase in the temporary mail rate of Transcontinental & Western Air (80). On December 10, petitioner petitioned for leave to intervene in this proceeding (82). The petition alleged that petitioner had a substantial property and financial interest in the subject matter of the proceeding, that its interest would not be adequately represented by existing parties, and that intervention would not unduly broaden or delay the proceeding. On December 16, respondent denied this petition for leave to intervene (86). On December 22 a *pro forma* hearing was held (89) and on the same day respondent issued an order establishing a new increased temporary mail rate for Transcontinental & Western Air (96). Petitioner instituted proceedings in the United States Court of Appeals

for the District of Columbia to review respondent's order denying petitioner the right to intervene (2).

Petitioner on January 6, 1949, in the case of American Overseas Airlines (124), and on December 10, 1948, in the case of Pan American Airways (198), petitioned for leave to intervene in the rate proceedings of each. Each petition alleged that petitioner had a substantial interest in the subject matter of the proceeding, that its interests would not be adequately represented by existing parties, and that its intervention would not unduly broaden the issues or delay the proceedings. On April 19, 1949, respondent, on its own initiative, proposed a further increase in the rates of both these carriers for the past period January 1, 1946 to December 31, 1948, and proposed to make such increased rates the permanent rates for that period (181, 263). At the same time, respondent directed Pan American Airways and American Overseas Airlines to show cause why these proposed permanent rates should not be immediately adopted as the temporary rate for each (182, 264). Respondent, at the same time, denied petitioner's petitions for intervention so far as each "requests intervention in the temporary mail rates," but granted intervention "as a matter of discretion . . . limited to the final mail rate determination, and then only to such issues as relate to cargo operations and the extent, if any, to which such cargo operations should be underwritten with 'need' mail pay." (185, 266) On April 29, respondent issued orders fixing the proposed increased rates as the temporary rates (193, 277).

Petitioner instituted an action in the United States Court of Appeals for the District of Columbia to review respondent's orders denying it the right to intervene in the temporary rate proceedings and granting only limited intervention in the permanent mail rate proceedings (98). Peti-

tioner subsequently amended its petition to include a review of the orders fixing temporary rates, alleging that respondent committed several errors in determining said rates (286).

C. *Action of the Court Below*

The petition to review the action of respondent in the Transcontinental & Western Air proceeding and the petition to review the action of respondent in the American Overseas Airlines and Pan American Airways proceedings were consolidated for hearing and decision.

On December 27, 1949, the United States Court of Appeals for the District of Columbia affirmed in part and dismissed in part the orders of respondent which had been challenged by petitioner (290). It was held that temporary rate orders were not reviewable because not final, that the orders denying intervention in the temporary rate proceedings were not reviewable for the same reason, and that the award of only limited intervention in the final mail rate proceedings was proper (289).

Jurisdictional Statement

This Court has jurisdiction to review the judgment and decree of the United States Court of Appeals for the District of Columbia by virtue of the following statutory provisions: 28 U.S.C. § 1254 (62 Stat. 928), and § 1006 (f) of the Civil Aeronautics Act of 1938 (52 Stat. 1024; 49 U.S.C. 646).

The petition is timely, the United States Court of Appeals for the District of Columbia having rendered its decision on December 27, 1949 and this petition having been filed on March 25, 1950.

The Questions Presented

1. Whether orders of the Civil Aeronautics Board fixing temporary rates of compensation for an air carrier for

transportation of the mail pursuant to which United States funds are actually paid to that carrier are appealable?

2. Whether orders denying an air carrier the right to intervene in the temporary mail rate proceedings of a competitor are appealable?

3. Whether an air carrier is entitled to intervene in the temporary mail rate proceedings of a competitor?

4. Whether petitioner's status as an air carrier of cargo is such as to entitle it to intervene in the permanent mail rate proceedings of a competitor and to raise therein any questions and present evidence upon any issue relating to the propriety or amount of mail pay to be awarded to such carrier?

5. Whether the Board imposed an undue and improper limitation upon the intervention of petitioner in the mail rate proceedings of other air carriers by limiting its participation to such issues as relate to cargo operations and the extent to which such operations should be underwritten with "need" mail pay?

Reasons for the Allowance of the Writ

1. The United States Court of Appeals for the District of Columbia has decided questions of general importance which have not been, but should be, settled by this Court.

2. The United States Court of Appeals for the District of Columbia has decided questions of substance relating to the construction and application of a statute of the United States which has not been, but should be, settled by this Court.

3. The United States Court of Appeals for the District of Columbia has failed to give proper effect to several applicable decisions of this Court.

These reasons are discussed in petitioner's attached brief.

WHEREFORE your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Court of Appeals for the District of Columbia, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Court of Appeals had in the cases numbered and entitled: *Seaboard & Western Airlines, Inc., Petitioner* v. *Civil Aeronautics Board,* Respondent, Docket No. 10086; and *Seaboard & Western Airlines, Inc., Petitioner* v. *Civil Aeronautics Board,* Respondent, Docket No. 10242, to the end that these causes may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the orders herein of the said United States Court of Appeals for the District of Columbia be reversed by this Court and for such other, further or different relief as to this Court may seem proper.

Dated, Washington, D. C., March 25, 1950.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Opinion of the Court Below

The opinion of the United States Court of Appeals for the District of Columbia appears in the certified copy of the Transcript of Record (284-289). It has not as yet been officially reported.

Jurisdiction

Reference is made to the jurisdictional statement in the petition (*supra*, p. 5).

Specification of Errors

1. The Court of Appeals erred in deciding that orders establishing temporary mail rates are not appealable.

2. The Court of Appeals erred in deciding that orders denying intervention in temporary mail rate proceedings are not appealable despite the fact that petitioner disclosed a "substantial interest" in the proceedings.

3. The Court of Appeals erred in deciding that orders denying intervention in temporary mail rate proceedings are not appealable despite the fact that the petitioner was concededly entitled to intervene in the permanent mail rate proceedings.

4. The Court of Appeals erred in deciding that petitioner, although he had established a "substantial interest," could not participate fully in the permanent mail rate proceeding and could not present evidence on all issues bearing upon the public interest but was to be limited to "such issues as relate to cargo operations and the extent, if any, to which such cargo operations should be underwritten with 'need' mail pay."

5. The Court of Appeals erred in failing to hold that the Civil Aeronautics Board erred in denying petitioner the right to intervene in the temporary mail rate proceedings of its competitors.

6. The Court of Appeals erred in holding that since the Postmaster General is a party to mail rate proceedings, it is unnecessary and the Civil Aeronautics Act does not require that a person having a substantial interest be allowed to present evidence and argument protecting the public interest.

7. The Court of Appeals erred in affirming the orders of the Civil Aeronautics Board granting petitioner the right of only limited intervention in the permanent mail rate proceedings of Pan American Airways and American Overseas Airlines.

8. The Court of Appeals erred in dismissing the appeal from the orders of the Civil Aeronautics Board fixing temporary rates for Pan American Airways and American Overseas Airlines.

9. The Court of Appeals erred in dismissing the appeal from the orders of the Civil Aeronautics Board denying intervention to Petitioner in the temporary mail rate proceedings of Transcontinental & Western Air, American Overseas Airlines, and Pan American Airways.

The Importance of This Case

The resolution of the issues raised in this case is of great importance to the Civil Aeronautics Board in its administration of the Civil Aeronautics Act, to the aviation industry, and to the American public generally.

Mail pay to certificated air carriers involves an expenditure by this Government of many millions of dollars each year.[1] Without it, a major portion of the aviation industry, as it operates today, might not be able to survive. There is also inherent in mail pay support for one segment of the industry the power to destroy another large segment of the industry which receives no mail pay but nevertheless operates in direct competition with carriers which do.

The importance of questions involving the extent of the power to administer mail pay has already been recognized by this Court when it granted certiorari in the case of *Transcontinental & Western Air, Inc.* v. *Civil Aeronautics Board,* 336 U. S. 601 (1949) "because of the importance

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[1] "Last year (1948) the air mail bill for our domestic trunk, feeder, and international carriers amounted to approximately $102,000,000. This figure is subject to upward adjustment. In the current year the bill will be higher, perhaps as high as $125,000,000." *Hearings before Committee on Interstate and Foreign Commerce on S. Res. 50,* 81st Cong., 1st Sess. 126 (1949).

of the question to the carriers and the public alike." *Id.* at 603.

I. *Temporary Mail Rate Orders and Intervention Therein*

The Court of Appeals has here decided that temporary rate orders themselves and orders denying intervention therein are not reviewable. Insofar as petitioner can determine, this is the first case in which an air carrier has sought judicial review of such orders of the Civil Aeronautics Board.

The effect of the decision below is to confer upon the Board a degree of discretion not contemplated by the Civil Aeronautics Act, to allow the Board to authorize disbursement of Government funds without adherence to statutory safeguards or standards imposed by Congress, and to preclude persons having a substantial interest in the proceedings from protecting themselves or raising for judicial review questions of public importance.

The Civil Aeronautics Act clearly contemplates development of the aviation industry in the direction of a self-supporting non-subsidized air transport system. *Cf. Transcontinental & Western Air, Inc.* v. *Civil Aeronautics Board,* 336 U. S. 601, 606 (1949). It contemplates also the coexistence of subsidized and non-subsidized carriers. *Cf. Flying Tiger Line, Inc.* v. *Atcheson T. & S. F. Ry. Co.,* 75 F. Supp. 188 (S.D. Calif. 1947). It is, of course, to the interest of the subsidized carrier to secure the maximum possible amount of mail pay. It is equally to his non-subsidized competitor's interest and to the interest of the public that such mail pay shall be no more than is essential to enable the subsidized carrier properly to conduct its operations to the extent such operations are found desirable and proper by the Civil Aeronautics Board.

Section 406 of the Civil Aeronautics Act (52 Stat. 998,

49 U.S.C. 486) is the only provision in the Act dealing with the authority and method for fixing rates for the transportation of mail. It provides that the Board is to set the fair and reasonable rate of compensation only after notice and hearing. Among the factors to be considered by the Board is "the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense."

Ever since the air transportation pattern for the North Atlantic was established some four years ago (*North Atlantic Route Case,* 6 C.A.B. 319 (1945)) American Overseas Airlines, Pan American Airways, and Transcontinental & Western Air have been operating these routes under so-called "temporary" rates. To date more than $50,000,000 has been paid to these three carriers pursuant to temporary rate orders of the Board (96, 197, 281). As yet no permanent rates for these carriers beyond 1945 have been established.

Nor is the practice of using temporary rates (rates fixed pending a determination of permanent rates which are subject to retroactive adjustments) limited to the international field. Since the practice was first adopted in 1946 (*Essair, Inc., Temporary Mail Rate,* 6 C.A.B. 687 (1946)), it has been in general use in the entire industry. *Hearings before Committee on Interstate and Foreign Commerce on S. Res. 50,* 81st Cong., 1st Sess., 130 (1949).

The Court of Appeals, on the premise that all temporary rates are subject to retroactive adjustment when a perma-

nent rate is fixed (289), held that temporary rate orders and orders denying intervention therein are not final for purposes of judicial review. Such a theory fails to give proper weight to the fact that under such orders funds are in fact disbursed from the public treasury to private parties for their use and benefit.

If rates in excess of those to which a carrier is entitled under Section 406 are paid to such carrier, his non-subsidized competitors will in all probability be placed at a competitive disadvantage. The subsidized carrier may engage in a program to eliminate his non-subsidized competitor and recover the costs of so doing in the form of temporary mail pay. The fact that several years later the Board, when it fixes a permanent rate, or the courts, when the permanent rate order is appealed, may decide that too much mail pay or mail pay for uneconomical or unauthorized operations was paid is of no help to the non-subsidized competitor. By that time he may have been forced out of business or been placed in such a poor competitive position that he cannot regain his old position. Nor is this merely *damnum absque injuria* as in the case of *Alabama Power Co.* v. *Ickes,* 302 U. S. 464 (1938). Section 406 prescribes the standards under which mail rate orders shall be formulated and Section 1006 (52 Stat. 1024, 49 U. S. C. 646) confers upon any person disclosing a "substantial interest" the right to seek judicial review from Board orders. *Cf. Federal Communcations Commission* v. *Sanders Bros. Radio Station,* 309 U. S. 470 (1940).

But the permanent effects of these "temporary" rate orders are not limited to competitors. The American public may also suffer directly from them. Although it may be subsequently determined that excessive temporary mail pay has been disbursed by the Government, recovery of such excess may as a practical matter be impossible. By the time the permanent rate is fixed, the carrier may be

out of business or on the verge of bankruptcy. Or perhaps the financial position and other factors concerning the carrier will be such that to recover the excessive amounts paid in the past will so jeopardize the operations of the carrier that the Board will conclude that it is not in the public interest to recover these amounts.[2] In at least four different mail rate proceedings the Board has found that excessive amounts were paid to carriers, but, despite its ability to do so, it refused to recapture the excessive amounts paid.[3]

II. *The Extent of Intervention in the Permanent Mail Rate Proceedings*

As has already been indicated, Section 1006 of the Civil

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[2] The following remarks of Chairman O'Connell are directly here in point:

> "In many of the cases which are now being processed by the Board's staff, the mail rates are being set for the past 2, 3, or even 4 years. This makes the process of effecting disallowances extremely difficult. The facts themselves surrounding the need of a carrier tend to become blurred with the passage of time. Furthermore, the management of a carrier is obviously in a much more favorable position to defend its past action than the staff of the Board is to attack them.
>
> "Finally, substantial disallowances from the costs which have already been incurred tend to defeat the purpose of the act in that they may so weaken the carrier financially that it is no longer in a position to develop routes and services in the soundest and most expeditious manner." *Hearings before Committee on Interstate and Foreign Commerce on S. Res. 50,* 81st Cong., 1st Sess., 136 (1949).

[3] At first the Board was of the opinion that any excessive payments during the pendency of a rate proceeding should be recaptured. *American Airlines, Inc.—Mail Rate Proceeding,* 3 C.A.B. 323, 325-333 (1942). This policy was soon abandoned, however. In *Pan American-Grace Airways, Inc.—Mail Rates,* 3 C.A.B. 550, 561-562 (1942), the Board found that although over $1,300,000 of excessive mail pay had been paid to the carrier, it would not be in the public interest to recapture this amount. The same decision was reached in *Pan American Airways, Inc., et al., Latin-American Rate Case,* 3 C.A.B. 657, 668-669 (1942) where the excessive amounts paid were over $4,350,000. The Board followed this practice in *Eastern Air Lines, Inc., Mail Rate Proceeding,* 3 C.A.B. 733, 742-743 (1942); and in *American Airlines, Inc., Mail Rate Proceeding,* 3 C.A.B. 770, 776-777 (1942), it vacated its prior order with respect to American's excessive earnings and permitted it to retain the excessive payments already made.

Aeronautics Act confers upon any person disclosing a "substantial interest" the necessary standing to seek judicial review of orders of the Civil Aeronautics Board.

The Court of Appeals correctly stated that: "It is not disputed that one who may appeal may intervene. The Board's Regulations provide for intervention by a person having 'a substantial interest', and in its brief before us the Board states that it has no quarrel with the view that one who may appeal is entitled to participate in the proceeding below." (287)

The Civil Aeronautics Board found that petitioner did not have a substantial interest in the mail rate proceedings of American Overseas Airlines (185) and of Pan American Airways (266), but nevertheless granted petitioner the limited right to intervene in order to participate in those issues concerned with the award of mail pay to support cargo operations (185, 186, 266, 267). The Court of Appeals decided that petitioner, since it was in competition with these carriers for the carriage of freight, did have a substantial interest but that the limited intervention granted was proper (289).

The issue presented to this Court, which, it is submitted, is of sufficient importance for this Court to consider, is this: conceding that a person has disclosed a substantial interest in a mail rate proceeding before the Civil Aeronautics Board, to what extent should he then be permitted to participate in that proceeding.

The question is of importance in the administration of the Civil Aeronautics Act, has not been previously considered by this Court, and the answer given by the Court of Appeals is, it is submitted, in conflict with decisions of this Court.

The coexistence of competing subsidized and non-subsidized air carriers which the Civil Aeronautics Act con-

templates creates a novel situation in the air carrier industry, especially in the international field in which passenger and cargo rates are not subject to direct regulation by the Civil Aeronautics Board. It is apparent that Government subsidy may enable subsidized carriers to eliminate every competing non-subsidized carrier from the industry. The extent to which the losses of subsidized carriers can properly be covered under the Civil Aeronautics Act by mail pay is of vital concern to the non-subsidized carrier. To the extent to which mail pay may be excessive the subsidized carrier is receiving Government funds to which it is not entitled and which enable it to operate on an uneconomical and inefficient basis and to incur losses in conducting its operations which it could not otherwise afford.

Moreover, the mail payments to a subsidized carrier are not earmarked for specific purposes. Consequently, the non-subsidized competitor has a very real concern in the entire mail rate proceeding, not merely in the issues arising in the field in which he may be directly competitive. Using this case as an illustration, although petitioner competes with Pan American only in the carriage of cargo, petitioner is directly affected by the amount of mail pay received by Pan American regardless of the reasons for which it is given. The end result and hence petitioner's interest would be precisely the same whether respondent might award Pan American $10,000,000 to underwrite passenger operations and $2,000,000 to underwrite cargo operations or $12,000,000 to underwrite passenger operations and nothing to underwrite cargo operations.

Underlying the grant to a person with a "substantial interest" of the right to attack or participate in the formulation of orders is the desire to protect the public interest. *Federal Communications Commission* v. *Sanders Bros.*

Radio Station, 309 U. S. 642 (1940). Having established such a substantial interest, a person should therefore be permitted to raise any issue which the agency is required to consider and which will affect the public interest. In the *Sanders Bros.* case, *supra,* although the economic effects upon an existing radio station were not a proper consideration in deciding whether or not to license a new station, this Court allowed the existing station "to appeal and to raise . . . *any relevant question of law in respect of the order of the Commission.*" *Id.* at 477. (Emphasis supplied).

It is submitted that the decision of the Court of Appeals in this case is in conflict with this statement of the Court. By sustaining the Board in granting only limited intervention, petitioner has been precluded from raising all relevant questions regarding the amount of mail pay to be awarded.

Conclusion

The petition for a writ of certiorari should be granted so that this Court may consider the important issues herein presented.

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Dated, Washington, D. C., March 25, 1950.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 702

SEABOARD & WESTERN AIRLINES, INC., PETITIONER

v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 284-289) is not yet officially reported. The pertinent orders and findings of the Civil Aeronautics Board (R. 86, 185, 193, 266, 277) have not been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 27, 1949 (R. 290). The petition

for a writ of certiorari was filed on March 25, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTIONS PRESENTED

During the pendency of proceedings to fix rates for the carriage of airmail, the Civil Aeronautics Board established temporary provisional rates to remain in effect until the determination of final rates, which would retroactively supersede the temporary rates. The Board denied petitioner intervention in the temporary mail rate proceedings, but granted it limited permissive intervention in the final mail rate proceedings. The questions presented are:

1. Whether orders of the Civil Aeronautics Board fixing temporary mail rates are judicially reviewable.

2. Whether orders of the Board denying leave to intervene in temporary mail rate proceedings are judicially reviewable.

3. Whether petitioner is entitled to intervene in the final mail rate proceedings to an extent greater than that permitted by the Board.

STATUTE AND REGULATION INVOLVED

The pertinent provisions of the Civil Aeronautics Act, 52 Stat. 973, as amended, and of the Economic Regulations of the Civil Aeronautics Board (14 C.F.R. (1949 ed.) 285.6, now Section 302.6 (14 F.R. 4355)) are set forth in the Appendix, *infra,* pp. 17-21.

STATEMENT

On December 10, 1948, and January 6, 1949, petitioner sought leave to intervene in proceedings under Section 406 of the Civil Aeronautics Act (Appendix, *infra*, pp. 17-19) relating to the rates to be paid by the United States for transatlantic carriage of airmail by American Overseas Airlines, Inc., Pan American Airways, Inc. and Transcontinental & Western Air, Inc. (TWA) (R. 82, 86, 124, 185, 198, 266). Petitioner alleged that it was engaging in air transportation of cargo without mail pay or subsidy in competition with these three carriers and that there was "grave danger" that the mail payments made to them would be used to subsidize uneconomical property carriage operations at rates which would threaten petitioner's ability to survive (R. 84, 127, 200).

Pan American, American Overseas, and TWA are certificated carriers authorized to transport mail, passengers and cargo over designated transatlantic routes. Petitioner is a "Large Irregular Air Carrier". Its operating authority was obtained by registering with the Civil Aeronautics Board under the blanket exemption provisions contained in the then Section 292.1 of the Board's Economic Regulations (R. 2, 82).[1] Petitioner is

[1] 14 C.F.R. (1949 Ed.) 292.1. This part has been redesignated, and currently is Part 291 of the Board's Economic Regulations. See 14 F.R. 4347. There are approximately 100 "Large Irregular Carriers" and 2,000 "Small Irregular Carriers" authorized to engage in limited air transportation operations pursuant to this regulation. These carriers are authorized to engage in the domestic air transportation of

not authorized to carry mail, nor does its letter of registration authorize it to carry transatlantic passengers (R. 83, 128, 201). In issuing the regulation under which petitioner secured its letter of registration, the Board stated that its authorization of irregular services was justified because such services would not have "an adverse competitive effect" on certificated carriers and would "fill a need" which could not be met by regularly scheduled carriers. Regulations Serial No. 388, dated May 5, 1947, 12 F. R. 3076.

The Board found that petitioner had failed to allege any matter showing that it had a substantial interest in the mail pay proceedings such as would entitle it to intervene as of right under the Board's regulations (R. 185, 266; Section 285.6, Appendix, *infra,* p. 19). Nevertheless, the Board found that "it would be in the public interest to permit limited intervention in the determination of a final mail rate as a matter of discretion, because it would produce improved analyses with respect to any issues as to the extent, if any, to which cargo operations should be underwritten by 'need' mail pay" (R.

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passengers and property without limitation as to points served and similar world-wide air transportation of property only. By definition contained in the Board's Regulations, an Irregular Air Carrier is one who, among other things, "does not operate, or hold out to the public expressly or by course of conduct that it operates, one or more aircraft between designated points * * * regularly or with a reasonable degree of regularity." A carrier is not deemed to be an Irregular Air Carrier unless the services performed by it "are of such infrequency as to preclude an implication of a uniform pattern or normal consistency of operation between * * * designated points." Section 292.1. See *Civil Aeronautics Board* v. *Modern Air Transport,* 179 F. 2d 622, 625 (C.A. 2).

185, 267).[2] Accordingly, petitioner was permitted to intervene "as a matter of discretion", such intervention "to be limited to the final mail rate determination, and then only to such issues as relate to cargo operations and the extent, if any, to which such cargo operations should be underwritten with 'need' mail pay" (R. 186, 267).

During the pendency of the mail rate proceedings, the Board has established temporary rates to remain in effect on a provisional basis until retroactively adjusted to conform with the final rates ultimately fixed.[3] Intervention in the proceedings

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[2] In the case of TWA, no proposal for a final mail rate had yet been made. Accordingly, the petition for intervention was denied "without prejudice to its right to renew the petition upon the issuance by the Board of a show cause order proposing a final mail rate" for TWA (R. 87).

[3] The temporary rate orders here sought to be reviewed provided that the proceedings shall "remain open pending entry herein of an order fixing a final rate or rates for the period January 1, 1946 through December 31, 1948, inclusive, which said final rate or rates may be higher or lower than the temporary rates fixed herein" (R. 198, 281). The economic factors present in air transportation since 1946 which made such temporary rates necessary have been fully described by the Board in a prior proceeding. *National Airlines, Inc., Mail Rates*, 9 C.A.B. 264 (1948), petition for review *sub nom. Air Line Pilots Association, International* v. *Civil Aeronautics Board*, dismissed without opinion (April 23, 1948, C.A. D.C.), certiorari denied, 335 U.S. 816. The Board there stated (9 C.A.B. at 266):

"Our temporary rate procedure arose out of a combination of circumstances affecting air transportation during the past 2 years. Rapidly rising costs, falling load factors, and extensive preparation for prospective traffic in substantial excess of that which materialized have combined to create a serious financial condition in the air transport industry. It became difficult or impossible for carriers to secure funds through the sale of stock, and more recently, it became equally difficult to secure borrowed capital on reasonable terms. During this period the permanent rates in effect in a number of cases

to fix these temporary rates was denied on the ground that such intervention might unduly delay the proceedings. (R. 87, 185-186, 267). The Board noted that by the delay the very purpose of the temporary rate would be defeated (R. 87).

Petitioner sought review in the court of appeals of (1) the latest orders fixing temporary rates for Pan American and American Overseas, (2) the orders denying intervention in the temporary mail rate proceedings and (3) the orders granting limited intervention in the final mail rate proceedings. The petitions for review were consolidated for hearing and decision in the court below (R. 284). The court below held that it was without jurisdiction to review the first two of these types of orders because of their interlocutory nature. And with respect to

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were quite apparently inadequate. Such inadequate mail pay caused, and would clearly continue to cause, unreasonable depletion of working capital, thus increasing the carriers' need for funds which had become increasingly difficult to secure through normal channels. Our permanent rate procedure was wholly inadequate to meet the situations thus created. Compliance with substantive and procedural statutory requirements necessarily applicable to such proceedings rendered it impossible to make final rates effective in time to correct the critical financial emergency in which many carriers found themselves. Some method of placing more nearly adequate mail pay in the hands of the carriers during this period became essential. To accomplish this purpose, the Board adopted a procedure which would enable it to issue a rate order in advance of determination by the Board of the many questions upon which the fixing of a final rate must depend. Thus a so-called temporary rate order does not fix a final rate but merely establishes a conservative basis for payment upon estimated accrued obligations of the Government, pending the determination of a permanent rate which may be either higher or lower than the temporary rate theretofore in effect. It is our practice to allow a margin so that temporary rates on the basis of our best estimates will be somewhat less

the third class—the intervention orders in the final rate proceedings—the court held that the limited intervention permitted by the Board fully protected petitioner's rights, and it accordingly affirmed the orders (R. 284-290). Petitioner here attacks each of these determinations.

ARGUMENT

1. The court below correctly held that orders establishing temporary mail rates, and orders denying intervention in temporary mail rate proceedings are interlocutory, and non-appealable.

There is nothing definitive about temporary mail rate orders. On the contrary, they are wholly provisional, or as petitioner puts it, they involve "payments on account" (Pet. 3). As the court below stated, "The Board, in its show cause orders relating to the final mail pay rates * * * clearly contemplates that the final rates will operate retroactively over the entire period during which the temporary rates are in effect. Thus, any excess of the temporary rates over rates finally fixed as proper will be recoverable either by credit or rebate" (R. 289). It is clear that such orders are interlocutory in every sense of that term.

Although Section 1006(a) of the Act (Appendix, *infra*, p. 19) provides for review of "any order" of the Board, it is clear that the reviewing jurisdic-

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than the probable final rate. Nonetheless, all temporary rates are subject to retroactive adjustment so that in no event can a carrier be permitted to retain more than the amount ultimately found to be proper upon the fixing of a permanent rate."

tion conferred upon the courts is limited to "final" orders. *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375;[4] *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U. S. 103; *Eastern Utilities Associates* v. *Securities and Exchange Commission*, 162 F. 2d 385 (C.A. 1); see *Rochester Telephone Corp* v. *United States*, 307 U. S. 125, 130-131. The rationale of this rule is that the courts should not be subjected to the burdens of piecemeal appeals and the administrative process should not be subjected to interruption and delay since the courts are able at the conclusion of the administrative proceeding to review the final orders entered, and to correct any errors of law that may have occurred during the course of the proceeding.

It is true that interlocutory orders have in certain circumstances been held to be reviewable, but only when the controversy has proceeded to a point where a losing party would be irreparably injured if immediate review were precluded. See *Republic Natural Gas Co.* v. *Oklahoma*, 334 U. S. 62, 67; *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, 546-7; *Utah Fuel Co.* v. *National Bituminous Coal Commission*, 306 U. S. 56; *Standard Airlines, Inc.* v. *Civil Aeronautics Board*, 177 F. 2d 18 (C.A. D.C.). But petitioner is not threatened with any

[4] The provisions of Section 313 (b) of the Federal Power Act of 1935 (49 Stat. 860, 16 U.S.C. 825l(b)) are indistinguishable from the provisions of Section 1006(a) of the Civil Aeronautics Act insofar as the question under consideration is concerned.

such injury. Without referring to its own situation, or alleging that the temporary rates are excessive, it argues only that "if" the rates are excessive, a non-subsidized competitor will "in all probability" be placed at a competitive disadvantage; that the subsidized carrier "may" try to eliminate his non-subsidized competitor; and that even if the excessive payments are recovered, the non-subsidized carriers "may" have been forced out of business (Pet. 14). Such injuries are wholly conjectural.[5] In the absence of some showing of an immediate, substantial and irreparable injury to petitioner, judicial review of the Board's interlocutory orders is not warranted. Should the certificated carriers use the mail pay awarded them to engage in unfair competition, the Act provides remedies therefor.[6]

Petitioner also argues that the public interest

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[5] The Board's findings in this case indicate how remote is the possibility that its temporary rates will prove to have been excessive (R. 194, 278). The Board has stated that its policy is to fix temporary rates only where it appears, among other things, that the existing mail rate "is substantially inadequate in terms of what reasonably may be anticipated as a *minimum* final rate." *Transcontinental & Western Air, Inc., Mail Rates,* Order No. E-3028, adopted July 20, 1949, show cause order made final by Order No. E-3128, adopted August 10, 1949. (Emphasis supplied.) Cf. R. 72-73. As a result of this policy, the final mail rates fixed have almost invariably been higher than antecedent temporary rates.

[6] Specific remedies are provided for the protection of carriers against unfair competition by proceedings before the Board (§ 411) and by injunction proceedings in a district court against unauthorized competition (§ 1007(a)). And any person may file a complaint with the Board with respect to any violation or omission of any requirement of the Act (§ 1002).

may suffer directly from excessive temporary mail rates, even though proper final rates are ultimately fixed, because the carrier receiving the excessive payments may not then have the funds to repay or the Board may not order the refund for fear of jeopardizing the carrier's operations (Pet. 15). In other words, the public interest "may" suffer irreparable injury in the absence of immediate review. Even if it be assumed, however, that petitioner has standing here as a defender of the public interest,[7] there is no basis for this speculative contention. No certificated air carrier has gone bankrupt and none has failed to meet its obligations to the United States. Contrary to the inference petitioner seeks to draw, the Board has never fixed a final rate which has not been made retroactively applicable during the entire period of effectiveness of the temporary rate or rates it replaced. The cases referred to by petitioner did not involve temporary rates and are inapposite here.[8]

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[7] As the court of appeals pointed out (R. 287), it is the function of the Postmaster General, not the petitioner, to assist the Board in the protection of the public interest in mail rate proceedings. Certainly if the Postmaster General, who pays the compensation fixed by the Board, has found no occasion to doubt his ability to recapture excessive payments, if any, the fears of an outsider do not justify judicial intervention at a preliminary stage.

[8] In all of the cases cited by petitioner (Pet. 15, note 3), the question was upon what date a final rate replacing and reducing a prior *final* rate should be made effective. Although the Board has the power to, and customarily does, make new final rates effective from the date of the institution of the proceeding, in the cited cases the Board made the reduced final rates effective prospectively only. In *Pennsylvania-*

The importance of the finality rule to the orderly operation of the administrative process cannot be stressed too strongly. Review of orders which are purely interlocutory encourages litigation which may be rendered needless; it burdens the courts with piecemeal appeals of matters which could be heard and determined in a single proceeding; and it provides a ready weapon for hamstringing effective administrative action.[9] The finality rule is especially necessary here. Judicial review, and the necessary delays which it involves, would destroy the efficacy of temporary rates—the avowed pur-

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Central Airlines Corporation, et al., Motions, 8 C.A.B. 685, affirmed, *Transcontinental & Western Air, Inc.* v. *Civil Aeronautics Board*, 169 F. 2d 893 (C.A. D.C.), affirmed, 336 U.S. 601, the Board pointed out that its decision in these cases "does not constitute an immutable holding that we will in no case make a downward readjustment retroactive" (8 C.A.B. 702, n. 45), and in *Western Air Lines, Inc., Mail Rates, Statement of Tentative Findings and Conclusions*, Order No. E-2333, December 30, 1948, the Board proposed to recapture excessive earnings during the pendency of a proceeding to fix a new rate by making the new rate retroactive to the date the proceeding was instituted by the carrier's petition. But irrespective of the policies adopted by the Board in cases in which no specific notice of the possibility of a retroactive reduction of a prior final rate is given, such cases afford no precedent in cases where the temporary rate order specifically provides that the final rate, whether higher or lower, will be retroactive. This is evident from some ten decisions of the Board, subsequent to those cited by petitioner, in which the Board reduced final mail rates retroactively to the date of an order to show cause why reductions should not be instituted. See, *e.g., Transcontinental & Western Air, Inc., Mail Rates*, 6 C.A.B. 595. The temporary rate orders before the Court specifically contemplate that the provisional rates there fixed shall be superseded by the final rates to be subsequently established retroactively (*supra*, p. 5, note 3).

[9] See *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 69.

pose of which is to tide the airlines over during the sometimes prolonged proceedings which will culminate in definitive mail rates.[10] The court below correctly held that the temporary rate orders were not finally dispositive of any rights of petitioner and, therefore, were not reviewable (R. 289).

It is equally clear that the denial of intervention in the temporary rate proceedings was properly held not appealable. Since the determination of the temporary rates themselves does not constitute any final disposition of rights, it is obvious that the denial of intervention in those interlocutory proceedings is not a final disposition of rights.[11] Moreover, the delays occasioned by judicial review of denial of intervention would as effectively frustrate the temporary rate program as would review of the temporary rate orders.

2. The court below properly refused to disturb the Board's orders permitting limited intervention in the final mail rate proceedings.

The Board permitted intervention as to issues relating "to cargo operations and the extent, if any, to which such cargo operations should be under-

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[10] See statement of Board in *National Airlines, Inc., Mail Rates, supra*, p. 5, note 3. We do not wish to minimize the importance of prompt determination of mail rates (cf. Pet. 15, note 2), but the issues in these proceedings are complex and, as a practical matter, it has not been possible to avoid the stopgap remedy of temporary rates.

[11] See, *infra*, p. 14, for discussion of appealability of intervention orders under the Civil Aeronautics Act generally.

written with 'need' mail pay" (*supra*, p. 4). This will obviously permit full participation as to matters relevant to the operations of the certificated carriers which are alleged to be competitive with petitioner. Moreover, the Board's regulation 285.6 (Appendix, *infra*, pp. 19-21) permits presentation of relevant evidence by anyone, whether or not possessing the status of formal intervenor. If petitioner has a legal interest here,[12] it is solely as a competitor in the carriage of cargo and that interest has been fully protected by the intervention allowed.[13] Only when and if it develops, as the rate hearings proceed, that the petitioner has been denied the opportunity to participate in some substantial way, can it successfully maintain that the intervention orders prejudice it.

It should be noted in this connection that the orders denying or limiting intervention, even if

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[12] In the event that certiorari is granted, the Board reserves the right to contend that petitioner has no right whatever of intervention in the proceedings. See *Air Line Pilots Association, International* v. *Civil Aeronautics Board*, O. T. 1948, No. 86, Brief in Opposition, pp. 14-15.

[13] Petitioner asserts a conflict between the decision of the court below and that of this Court in *Federal Communications Commission* v. *Sanders Radio Station*, 309 U.S. 470 (Pet. 18), which permitted appeal by a competitor with no legal interest because the appeal provisions of the Federal Communications Act, 48 Stat. 1064, as amended, 47 U.S.C. 151, *et seq.*, would otherwise have been rendered nugatory (Pet. 18). That Act relies on appeals by competitors to vindicate the public interest. In Civil Aeronautics Act mail pay proceedings, however, the Postmaster General assists the Board in representing the public interest. Intervention and appeal by private persons in mail pay proceedings are, therefore, properly limited to matters in which the intervenor is deemed to have a legal interest.

wholly erroneous, did not dispose of petitioner's "rights." When final mail rate orders are entered, petitioner will be able, if it still so desires, to secure a review of such orders and the orders limiting its intervention. If it is then established that petitioner's "right" to intervene was impaired, it may have such orders set aside, and the cases remanded for further proceedings in which it may participate to the extent declared proper by the court. Whether or not the limited intervention orders were proper, those orders are not appealable until the proceedings before the Board are finally completed.

The cases concerning intervention in judicial proceedings are not applicable here. Thus *Brotherhood of Railroad Trainmen* v. *Baltimore & Ohio R. R. Co.*, 331 U. S. 519, held denial of intervention in a district court action immediately appealable. But the Court's ground of decision (see p. 524) was that "since [the intervenor] * * * cannot appeal from any subsequent order or judgment in the proceeding unless he does intervene, the order denying intervention has the degree of definitiveness which supports an appeal therefrom. See *Pipe Line Co.* v. *United States*, 312 U. S. 502, 508." Cf. *Dickinson* v. *Petroleum Conversion Corp.*, 338 U. S. 507. It is clear that the reason for this rule is not applicable to orders denying or limiting intervention in Civil Aeronautics Board proceedings. Judicial review of a final order of the Board may

be obtained by a person demonstrating a substantial interest in that order; there is no requirement that a person have been a party to the administrative proceeding, at least where he has exhausted his remedies by seeking intervention. Section 1006(a) (Appendix, *infra*, p. 19). In view of this fact, there will be no definitive disposition of petitioner's asserted interests until the proceedings are finally concluded.[14] Since the intervenor may appeal from the final order, there is no basis for excepting him from the usual finality rule. Cf. *Dickinson* v. *Petroleum Conversion Corp., supra.*

Neither the courts nor petitioner can know at this stage of the proceedings whether petitioner will have cause or desire to appeal from the final orders which may be entered. The limited intervention permitted petitioner may prove fully adequate to allow it to engage in the proceedings to the full extent desired. Moreover, it is entirely possible that the petitioner will be fully satisfied with the substantive orders—the final mail rate orders—which are ultimately entered. The cogent reasons for general application of the finality rule (discussed *supra*, p. 11) are apposite here.

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[14] We have found only two cases holding denial of intervention in an administrative proceeding immediately appealable. *Alston Coal Co.* v. *Federal Power Commission*, 137 F. 2d 740 (C.A. 10); *Okin* v. *Securities and Exchange Commission*, 143 F. 2d 960 (C.A. 2). The *Alston* holding of appealability may be justified because the applicable statute (Natural Gas Act, Sec. 19, 52 Stat. 831, 15 U.S.C. 717r (b)) permits appeals only by parties to the administrative proceeding. But the court's reliance upon the decision of this Court in *Federal Communications Commission* v. *National Broadcasting*

CONCLUSION

The decision below is correct insofar as it affects petitioner adversely, and there is no conflict of decision. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Company, 319 U.S. 239, was misplaced. The *National Broadcasting* case neither considered nor decided the question of when review of an intervention order becomes available. The particular order in question was reviewed at the time of, and as an incident to, the review of the final order in the proceeding. The *Okin* case followed the *Alston* case without elaboration.

APPENDIX

The pertinent provisions of the Civil Aeronautics Act of 1938, as amended,[15] are as follows:

> Sec. 406(a) The [Board] is empowered and directed, upon its own initiative or upon petiiton of the Postmaster General or an air carrier, (1) to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith (including the transportation of mail by an air carrier by other means than aircraft whenever such transportation is incidental to the transportation of mail by aircraft or is made necessary by conditions of emergency arising from aircraft operation), by each holder of a certificate authorizing the transportation of mail by aircraft, and to make such rates effective from such date as it shall determine to be proper; (2) to prescribe the method or methods, by aircraft-mile, pound-mile, weight, space, or any combination thereof, or otherwise, for ascertaining such rates of compensation for each air carrier or class of air carriers; and (3) to publish the same; and the rates so fixed and determined shall be paid by the Postmaster General from appropriations for the transportation of mail by aircraft.

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[15] Act of June 23, 1938, 52 Stat. 973, 49 U.S.C. 401 *et seq.*; Reorg. Plan No. IV, Sec. 7, effective June 30, 1940, 5 F.R. 2421, 54 Stat. 1235, 49 U.S.C. 401 *et seq.*

(b) In fixing and determining fair and reasonable rates of compensation under this section, the [Board], considering the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers, may fix different rates for different air carriers or classes of air carriers, and different classes of service. In determining the rate in each case, the [Board] shall take into consideration, among other factors, the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation of mail; such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law; and the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense.

(c) Any petition for the fixing of fair and reasonable rates of compensation under this section shall include a statement of the rate the petitioner believes to be fair and reasonable. The Postmaster General shall introduce as part of the record in all proceedings under this

section a comprehensive statement of all service to be required of the air carrier and such other information in his possession as may be deemed by the [Board] to be material to the inquiry.

* * * * *

Sec. 1006. (a) Any order, affirmative or negative, issued by the [Board] under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

Section 285.6 of the Economic Regulations of the Civil Aeronautics Board (14 C. F. R. (1949 Ed.) 285.6; now section 302.6 (14 F. R. 4355)), provided:

APPEARANCES BY THIRD PERSONS AND FORMAL INTERVENTIONS.

(a) *Appearances by third persons.* Any person, including any State, political subdivision thereof, State aviation commission, or other public body, may appear at any hearing and present any evidence which is relevant to the issues. Such persons may also suggest questions or interrogatories to be propounded

by public counsel to witnesses called by other persons. With the consent of the examiner, or of the Board, if the hearing is held before the Board, such persons may also cross-examine witnesses directly.

(b) *Formal interventions.* (1) Any person having a substantial interest in the subject matter of any proceeding may petition for leave to intervene in such proceeding and may become a party thereto upon compliance with the provisions of this paragraph. In general, such petitions will not be granted unless it shall be found:

(i) That such person has a statutory right to be made a party to such proceeding; or

(ii) That such person will or may be bound by the order to be entered in the proceeding; or

(iii) That such person has a property or financial interest which may not be adequately represented by existing parties, if such intervention would not unduly broaden the issues or delay the proceeding.

However, the denial of such a petition for leave to intervene shall not prevent the petitioner from participating in the proceeding in the manner described in paragraph (a) of this section.

(2) Unless otherwise ordered by the Board every petition for leave to intervene shall be filed with the Board prior to the first prehearing conference, or in the event that no

such conference is to be held, not later than 10 days prior to the hearing. Copies of the petition shall be mailed or delivered to each party to the proceeding prior to the filing of the petition. The Board, however, may pass upon any such petition without receiving testimony or argument either from the petitioner or from other parties to the proceeding. The petition shall clearly set forth the interest of the petitioner, and shall otherwise comply with the requirements of section 285.3.

(3) No petition for leave to intervene not filed within the time limited by subparagraph (2) of this paragraph, will be entertained unless the petitioner shall clearly show good cause for his failure to file such petition within the time so limited. In the event that such petition is heard by an examiner, his determination shall be governed by the standards set forth in this section, but no decision by an examiner on such petition shall be binding on the Board. Interventions provided in this section are for administrative purposes, and no decision to grant leave to intervene shall be deemed to constitute a finding or determination that the intervening party has such a substantial interest in the order that is to be entered in that proceeding as will entitle it to demand court review of such order.

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